Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 74-5968

JOHN A. GEDERS,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1975
CERTIORARI GRANTED APRIL 21, 1975

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 73-69 CR-T-K

UNITED STATES OF AMERICA

v.

RUFUS RANDOLPH SURLES, JR.; JAMES M. MAHONEY; MICHAEL J. FINK; RANDY KILGORE; JOHN A. GEDERS; FRED FINK; and DAVID BUTLER

The Grand Jury charges:

COUNT ONE

Beginning on or about September 1, 1972, and continuing until on or about November 26, 1972, in Tampa, Florida and elsewhere in the Middle District of Florida,

RUFUS RANDOLPH SURLES, JR.;
JAMES M. MAHONEY;
MICHAEL J. FINK;
RANDY KILGORE;
JOHN A. GEDERS; and
FRED FINK

did combine and conspire together and with Steven Howard Patrick and James T. Waddington, deceased, named here as co-conspirators but not as defendants, to commit offenses against the United States, that is to unlawfully import marihuana into the United States from Columbia, South America; in violation of Title 21, United States Code, § 952 (a).

On or about the times hereinafter stated the defendants and co-conspirators did commit, among others, the following overt acts in furtherance of the conspiracy and to effect the unlawful purpose thereof:

(1) On or about November 10, 1972, RANDY KILGORE traveled from Tampa, Florida, to Miami, Florida and met DAVID BUTLER at the Marriot Hotel.

(2) On or about November 25, 1972, at Jacksonville, Florida, RUFUS RANDOLPH SURLES, JR. rented a Sandpiper Motorhome.

(3) On or about November 25, 1972, at Tampa, Florida, JAMES M. MAHONEY gave DAVID BUTLER $10,000 cash as prepayment to DAVID BUTLER for flying a Piper Aztec airplane from Tampa, Florida, to Colombia, South America and return to Lehigh Acres, Florida.

(4) On or about November 26, 1972, JOHN A. GEDERS, JAMES M. MAHONEY and DAVID BUTLER flew from Tampa, Florida, to Colombia, South America and back to Lehigh Acres, Florida;

all in violation of Title 18, United States Code, § 371.

COUNT TWO

On or about November 26, 1972, in Lee County, Florida, in the Middle District of Florida,

JAMES M. MAHONEY;
RANDY KILGORE;
JOHN A. GEDERS; and
MICHAEL J. FINK

did unlawfully import into the United States from Colombia, South America, a controlled substance, to wit: approximately 1,000 pounds of marihuana; in violation of Title 21, United States Code, § 952 (a) and 960 (b).

COUNT THREE

On or about November 26, 1972, in Lee County, Florida, in the Middle District of Florida,

JAMES M. MAHONEY;
JOHN A. GEDERS; and
MICHAEL J. FINK

did knowingly possess, with intent to distribute, a controlled substance, to wit, approximately 977 pounds of marihuana; in violation of Section 841 (a)(1), Title 21, United States Code.

COUNT FOUR

On or about November 26, 1972, at Tampa, Florida, in the Middle District of Florida,

JOHN A. GEDERS

did willfully, knowingly and unlawfully carry a firearm during the commission of a felony for which he might be prosecuted in a court of the United States, that is, he did carry a Smith and Wesson Model 36 pistol, .38 caliber while unlawfully importing marihuana into the United States; all in violation of Title 18, United States Code, § 924.

COUNT FIVE

On or about November 26, 1972, in Lee County, Florida, in the Middle District of Florida,

DAVID BUTLER

did knowingly possess, with intent to distribute, a controlled substance, to wit, approximately 50 pounds of marihuana; in violation of Title 21, United States Code, § 841 (a)(1).

A TRUE BILL

/s/ P. R. Lutz
Foreman

JOHN L. BRIGGS
United States Attorney

By: /s/ Oscar Blasingame
OSCAR BLASINGAME
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF FLORIDA—TAMPA DIV.

No. 73-69-Cr. T-K

Microfilmed-Roll No. 59

[Filed Tampa, Fla. Nov 30, 1973, Wesley R. Thies, Clerk]

UNITED STATES OF AMERICA

v.

JOHN A. GEDERS

On this 30th day of November, 1973 came the attorney for the government and the defendant appeared in person and with counsel, Ralph Rinehart

IT IS ADJUDGED that the defendant has been convicted upon plea of Not Guilty and a Jury Verdict of Guilty, of the offense of conspiring, importing and possessing, with intent to distribute, a controlled substance, to wit, approximately 977 pounds of marihuana, in violation of Title 18, Section 371 and Title 21, Sections 841(a)(1), 952(a) and 960(b), U.S.C. as charged in 3 counts of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three Years on count One, Three Years on count Two, and Three Years on count Three, the sentences imposed on counts Two and Three shall run concurrently with the sentence imposed on count One, and that the defendant

shall become eligible for parole at such time as the board of parole may determine. (18 U.S.C. Section 4208(a)(2), or until the defendant is otherwise discharged as provided by law. It is further

ORDERED that the prison sentence imposed herein shall begin on or before noon on December 3, 1973.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

_____

/s/ [Illegible]
United States District Judge.

(Signed) _____
Clerk.

(By) _____
Deputy Clerk.

Trial Transcript Page 124 (lines 8-25), Page 125 (lines 1-9)

(Recess of Court between cross-examination of Government Witness Kilgore by defense counsel Rinehart and Clark with admonitory instructions by the Court to the jury and Kilgore.)

THE COURT: We will have a recess, Ladies and Gentlemen. While you are in the jury room don't discuss this case among yourselves. Remember my instructions in that regard.

You may now go to the jury room.

(Thereupon the following proceedings were had in the absence of the jury:)

THE COURT: Let the record show the Jury has withdrawn.

Mr. Clark, do you wish to cross-examine the witness?

MR. CLARK: I do, Your Honor.

THE COURT: Mr. Kilgore, you may step down during the recess. Do no discuss this case with anyone. Don't talk about it with any attorneys or any Government agents or any other witnesses or anyone.

Do you understand?

THE WITNES: Yes, sir.

THE COURT: Just get yourself a drink of water; and probably the best thing to do after you have refreshed yourself is just to come back and sit in the back of the Courtroom.

THE WITNESS: Yes, sir.

THE COURT: All right. Court will be in recess for ten minutes.

Trial Transcript Page 176 (all), Page 177 (all), Page 178 (lines 1-8)

(Recess of Court for lunch (12:15-1:45 p.m.) during cross-examination of Government Witness Kilgore by defense counsel Clark with admonitory instructions by the Court to jury and Kilgore.)

THE COURT: All right, we are going to recess at this time, Ladies and Gentlemen. It is 12:15.

I will ask you to be back at 1:45. That is an hour and a half. During the interim remember the instructions I have given you, please. Don't discuss this case with anyone or allow anyone to discuss it with you.

Don't read anything about it or look at anything about it or listen to anything about it.

Keep yourselves entirely free of any outside information about this case.

You are now excused and may go out through the Jury room. Be back in there please by 1:45. Thank you.

(Thereupon the following proceedings were had in the absence of the Jury:)

THE COURT: Is there any re-cross of the defendant —of the witness?

MR. BLASINGAME: Re-Direct?

THE COURT: Re-Direct.

MR. BLASINGAME: Yes, sir.

THE COURT: You are now excused, Mr. Kilgore, until 1:45. Be back available in the Courtroom at 1:45.

THE WITNESS: Yes, sir.

THE COURT: In the meantime don't discuss this case —what is your view about that?

MR. BLASINGAME: I don't think he should discuss it with anyone, Your Honor.

THE COURT: And that includes Mr. Blasingame and Government agents and any witnesses or anyone.

THE WITNESS: Yes, sir.

THE COURT: You are still on the witness stand, do you understand that?

THE WITNESS: Yes, I do.

THE COURT: Now be careful about that.

Don't even talk with them about the weather. If anybody sees you talking they are going to ask what you talked about. And probably the first thing that is going to happen when you get back on the witness stand, somebody is going to ask you "Did you talk with anybody about this case?" Do you understand?

THE WITNESS: Yes, sir.

THE COURT: And you are under oath.

THE WITNES: Yes.
THE COURT: So I am not telling you what is going to happen. I am telling you what you should do. Just don't talk to anybody about this case.
THE WITNESS: I won't, Your Honor.

(Thereupon the witness retired from the Courtroom and further proceedings were had in the absence of the witness)

Trial Transcript Page 317 (lines 21-25, Page 318 (all)

(Recess of Court overnight during cross-examination of Government Witness by defense counsel Rinehart with admonitory instructions by the Court to jury and Patrick.)

THE COURT: We are going to recess at this time. We will resume tomorrow morning at 9:30.
Ladies and Gentlemen, remember the instructions I have given you.
Keep an open mind about this case.
Don't read anything about it or listen to anything about it or hear anything about it and don't let anyone talk with you about it. Don't talk about it among yourselves.
You are excused and I request you to be in the Jury room by 9:30 tomorrow morning. Thank you. You may go out through the Jury room.

(Thereupon the following proceedings were had in the absence of the Jury:)

THE COURT: Mr. Patrick, you will be requested to be here tomorrow morning by 9:30.
THE WITNESS: Yes, sir.
THE COURT: And you are directed not to discuss this case between now and then with anyone. That includes any of the attorneys for the Government or any of the agents of the Government, or anyone else. Do you understand?
THE WITNESS: Yes, sir.
THE COURT: You will be subject to further cross-examination by Mr. Clark.

Do you wish to cross-examine?
MR. CLARK: Yes, Your Honor.
THE COURT: All right, thank you. So you are excused now. Be back by 9:30

Trial Transcript Page 365 (lines 12-21), Page 366 (all), Page 367 (all), Page 368 (lines 1-13)

(Resumption of cross-examination of Government Witness Patrick by defense counsel Clark—resumed from October 10, 1973.)

TESTIMONY OF STEVEN HOWARD PATRICK
(Resumed)

Thereupon, the testimony of the Government witness Steven Howard Patrick, which was interrupted at the close of the proceedings on October 10, 1973, was resumed in the presence of the Jury as follows:

THE COURT: Mr. Patrick you will remember that you are under oath.
THE WITNESS: Yes, sir.
THE COURT: You may cross-examine, Mr. Clark.
MR. CLARK: Thank you.

CROSS-EXAMINATION

BY MR. CLARK:

Q Mr. Patrick, where were you yesterday?
A What time of the day, sir?
Q Well from 9:30 until, say, 2:00 o'clock yesterday afternoon.
A I was in the witness room as far as I can recollect.
Q Right here, right down the hallway?
A Yes, sir.
Q Did you talk to Mr. Kilgore during that time?
A Not about the case; no, sir.
Q You had no discussion with Mr. Kilgore?
A Not about the case; no, sir.

Q Did Mr. Kilgore come and talk to you each time he came out yesterday during the course of his testimony?
A Not about the case; no, sir.
Q Not about the case?
A Not about the case.
Q Did you see Mr. Kilgore last night?
A No, sir—well, I took him home, sir.
Q What did you talk about?
A Just general discussion.
Q You didn't talk a bit about his testimony or a bit about this case?
A No, sir.
Q Did you see Mr. Kilgore yesterday at lunch?
A Yes, sir.
Q Did you talk to Mr. Kilgore about this case then?
A No, sir.
Q When was the first time you saw Mr. Kilgore today?
A The first time I saw him today was approximately 8:30 this morning when I was eating breakfast.
Q And where was that, sir?
A At the Sheraton Motor Inn over here, in town.
Q Did you talk to him then?
A Not about the case; no, sir.
Q Well how long did you talk?
A Well, I have been in his company since 8:30 this morning, sir.
Q You have been with Mr. Kilgore since 8:30 this morning?
A Off and on.
Q Off and on? What did you discuss?
A Just general discussion.
Q You didn't talk a bit about the case.
A Not a bit about the case.
Q And not a bit about what Mr. Kilgore has testified to?
A Not a bit about what he testified to.
I understood that I was under express instructions not to speak about the case. That is why there was no discussion about the case. As the Judge told me yesterday.

Q And you haven't done that?
A I haven't done that.

Trial Transcript Page 435 (lines 3-21)

(Recess of Court (for ten minutes) during cross-examination of Government Witness Patrick by defense counsel Clark with admonitory instructions by the Court to the jury and Patrick.)

THE COURT: All right, ladies and gentlemen, we will have a ten minute recess.
Take the opportunity to refresh yourselves.
Don't talk about this case among yourselves. You may go to the juryroom.

(Thereupon, the following proceedings were had in the absence of the Jury:)

THE COURT: Let the record show the Jury has withdrawn.
And you may be excused for ten minutes, Mr. Patrick. Remember, do not discuss this case with anyone.
THE WITNESS: Yes, sir.
THE COURT: And perhaps, during this short interim, don't talk with anybody about anything.
THE WITNESS: Yes, sir.
THE COURT: All right, Court will be in recess for ten minutes.

Trial Transcript Page 471 (lines 1-17)

(Recess of Court for lunch (1:25-2 p.m.) during cross-examination of Government Witness Patrick by defense counsel Clark with admonitory instructions by the Court to the jury and Patrick.)

Ladies and gentlemen, we are going to recess now. It is now, as you can see, about twenty-five minutes till 1:00.
I will ask you to be back at 2:00 o'clock in the juryroom.
Remember the instructions I have given you, please. Don't talk about the case and so forth.

You may go out through the juryroom.

(Thereupon, the following proceedings were had in the absence of the Jury:)

THE COURT: Mr. Patrick, you are excused. Be back in the witness room by 2:00 o'clock. Don't talk about this case with anyone.

THE WITNESS: Yes, sir.

Trial Transcript Page 840 (lines 20-25), Page 841 (lines 1-20)

(Exchange after jury had retired, following taking of 5th Amendment privilege by Government Witness Butler, between defense counsel Rinehart, Court and Prosecutor Blasingame regarding invoking of the Rule and question of whether case agent Miller could participate in prosecutorial conference.)

MR. RINEHART: Of course we would like to have Mr. Miller reminded that he is under the Rule also and should not discuss his testimony with these other agents,

THE COURT: Don't talk with them, Mr. Miller.

MR. LOWELL MILLER: Yes, sir.

THE COURT: I just did. Anything else?

MR. BLASINGAME: Mr. Miller could be present with us while we confer with them as long as he doesn't suggest anything, can't he? He is the investigating agent on the case.

MR. RINEHART: Your Honor, I would strenuously object, because—

THE COURT: I don't think that is necessary. This is a case where everybody is no concerned about everybody.

I have never seen so much—so many people who have got their fingers in the broth.

Keep Mr. Miller out of the conferences.

All right, that ought to satisfy you.

Anything else about that?

MR. RINEHART: That's about it right now.

THE COURT: If everybody else will be as circumspect about their conduct as this, why that will be all right.

Trial Transcript Page 999 (lines 7-20)

(Recess of Court for lunch during cross-examination of Government Witness Kilgore (recalled) with admonitory instructions by the Court to jury and Kilgore.)

MR. RINEHART: My examination may be a little bit long.

THE COURT: All right, do you object to delaying it until after lunch?

MR. RINEHART: No, I have no objection.

THE COURT: We will recess at this time, Ladies and Gentlemen.

Mr. Kilgore, you are directed to be back here at 1:45.

In the meantime, don't talk to anyone about this case. Do you understand?

THE WITNESS: Yes, sir.

THE COURT: You are excused. Please step down.

Ladies and Gentlemen, please remember the instructions I have given you about your conduct.

Don't talk with anyone about this case and please be back in the Jury room by 1:45.

Trial Transcript Page 1041 (lines 13-25), Page 1042 (all), Page 1043 (all), Page 1044 (all), Page 1045 (Lines 1-11)

(Exchange following recall testimony of Government Witness Kilgore regarding requests for recesses, nature of cross-examination, scheduling of defense witnesses, etc.)

MR. CLARK: Your Honor, it is my understanding that Mr. Buchanan has arrived; and I would like a few minutes to—

THE COURT: All right. Do you want a recess? Is that what you want?

MR. CLARK: Yes, Your Honor.

THE COURT: That is all you have to do. Just ask for a recess.

We will have a recess, Ladies and Gentlemen. Go to the Jury room. Don't talk about this case among yourselves. Thank you.

(Thereupon the following proceedings were had in the absence of the Jury:)

THE COURT: Mr. Clark, in the future, if some witness appears don't say a certain Mr. So-And-So and act as if—if you want to convey a message to me, don't also convey one to the Jury.

If the purpose is to tell me what you want, just tell me.

MR. CLARK: Yes, Your Honor.

THE COURT: That you would like a recess to talk to a witness. If you want to mention the witness's name, you may do that.

MR. CLARK: I will do so in the future, Your Honor.

THE COURT: All right. Thank you very much. How long do you want? Do you know?

MR. CLARK: Five minutes?

THE COURT: Well, more than that if you want it. Ten minutes?

MR. CLARK: Ten minutes, if I may, Your Honor.

THE COURT: Yes, sir. You may have it. I asked you.

All right. Now let me say this to you. If you will give more consideration to the form of your questions, you will be able to answer more questions (sic).

I don't want to restrict your right to cross examine; but, if you persist in asking questions as you have, I am going to make the same rulings I make; and I am going to continue to do that as long as you practice in my Court.

You are not going to testify through asking questions.

You can ask a question. You can ask a leading question without testifying.

You may have a different view about that. Your view apparently is that you are supposed somehow to keep from surprising the witness—I mean to keep from apprising the witness of what you want him to know, or to keep from letting him do self-serving declarations, and that you are supposed to do the testifying.

That is the reason that I sustained the objections to your questions.

Now it may be just a firm conviction you have. If it is, I hope it serves you better in other Courts than it will in this one.

Court will be in recess.

(Upon the resumption of the trial after the recess above-indicated, the following further proceedings were had, still in the absence of the Jury:)

MR. CLARK: Your Honor, there is one matter. The next witness to be called is Mr. Buchanan, from the Miami office.

I would like to have Mr. Butler present in the Courtroom so that he can identify Mr. Butler for the Jury.

MR. BLASINGAME: We would object and would stipulate that he knows Mr. David Butler.

THE COURT: Does he say he does not know him?

MR. CLARK: No, sir. I would just like to have him point out Mr. Butler for the Jury.

THE COURT: All right. I have denied that request. If he indicates any question in his mind about who Mr. Butler is—

MR. BLASINGAME: I don't think there will be any question. I think it will come out clearly.

THE COURT: All right. Did you get a copy? I did enter an Order about indigency.

MR. CLARK: Yes, I just received a copy.

THE COURT: All right. It is filed.

Now, let me ask you this. Do you have any other—after we have him, do you have another witness? Do you need a recess to go out and talk to somebody?

MR. CLARK: No, sir.

THE COURT: All right.

MR. RINEHART: I may need about five minutes because I am trying to decide now whether to put the Defendant on the stand.

THE COURT: Well if you would just ask me, "May we have a recess", then I will know. That is all you need to do. All right.

Trial Transcript Page 1076 (lines 24-25), Page 1077 (lines 1-11)

(Exchange following re-cross examination by Prosecutor LaSpada of Witness Buchanan when Court granted recess (for five minutes) to defense upon request by counsel Rinehart with admonitory instructions by the Court to jury.)

MR. RINEHART: May we have a five minute recess?

THE COURT: Yes, sir. The last time we took five minutes—I'm not being critical—but I do believe in calling facts facts. The last one who asked for a five minute recess, we took twenty.

How much time do you really think it would take?

MR. RINEHART: About five minutes.

THE COURT: Fine. I will hold you to it. Thank you.

We will be in recess for five minutes. Don't talk about the case among yourselves.

Trial Transcript Page 1147 (lines 20-25), Page 1148 (all), Page 1149 (all), Page 1150 (all), Page 1151 (all), Page 1152 (all), Page 1153 (all), Page 1154 (line 1)

(Exchange following completion of direct examination of Defendant Geders by counsel Rinehart and request by Prosecution for recess before commencing cross-examination of Defendant Geders and request by Prosecution for an admonitory order by the Court against Defendant Geders to place him incommunicado during the overnight recess of the trial proceeding with admonitory instructions by Court to jury and Defendant Geders.)

THE COURT: Now I am sure the jury would be willing to stay some additional time and I would have no objection to asking them. I do note that it is five minutes to 5:00 o'clock. Mr. Clark, what do you wish to do?

MR. CLARK: I have no questions for this witness, Your Honor.

THE COURT: Does the Government wish to proceed with its cross-examination now? There are reasons why you may or may not—except for the time factor—I don't know.

MR. LaSPADA: We would prefer to recess.

THE COURT: All right. You may.

Ladies and gentlemen, I'm going to ask you to stay a reasonable time.

THE CLERK: He said he wanted to recess.

THE COURT: Sir?

MR. LaSPADA: I would prefer to recess, Your Honor.

THE COURT: Oh, to recess.

MR. LaSPADA: Until tomorrow.

THE COURT: You want to defer cross-examination.

MR. LaSPADA: To defer the cross-examination.

THE COURT: Well, Ladies and Gentlemen, I'm going to excuse you now and ask you to remember all the instructions I have previously given you.

Don't read anything about this case or hear anything about it or let anyone discuss it with you in any way.

You are excused, to come back to the Jury Room tomorrow morning by 9:30.

Please be there, and go out now through the Jury Room. Thank you.

(Thereupon the following proceedings were had in the absence of the Jury:)

THE COURT: (Addressing the witness) All right, you may step down and thank you.

MR. BLASINGAME: Has this witness been instructed now that he is not to talk to anyone whatsoever, including his attorneys—or anyone—about this case at all?

MR. RINEHART: If he were instructed not to talk to his attorney, I feel that it would be improper. I think I always have the right to talk to my client.

MR. BLASINGAME: I don't think so.

THE COURT: Well I don't know whether you requested that I so instruct another witness when there was a recess, to that effect; but you do—let's make this clear—you always have the right to talk to your client—but except for the accident—and "accident" means something over which you have no control—the cross-examination would have been right now and you would not have had an opportunity to talk to him.

Now, because of the fact that it is 5:00 o'clock and we are recessing until tomorrow, you would have that opportunity.

If you had requested the opportunity and this had been 2:00 o'clock—and if you had said "If the Court please, I would like to have a recess"—and then, outside the presence of the Jury, had said, "because I want to talk to my client"; what would I have said?

MR. RINEHART: You probably would not have granted the recess, Your Honor.

THE COURT: Should I have?

MR. RINEHART: Not if there was something else to do, Your Honor.

THE COURT: Well would you have had a right to just talk to your client while he is subject to cross-examination?

MR. RINEHART: Well I would not—

THE COURT: Would you have?

MR. RINEHART: I would not instruct my client anyway.

THE COURT: Well would you have talked to him? Would you have had a right to confer with him? That is what I want to know.

MR. RINEHART: If there were matters that I felt I had not brought out on Direct and that I should have covered—

THE COURT: Before he is cross-examined?

MR. RINEHART: Even before he is cross-examined. Sometimes we remember things we did not—

THE COURT: Yes, sir. That is the reason you are entitled to Redirect.

MR. RINEHART: Right.

THE COURT: Now I would appreciate it if you would answer my question. We have had a little trouble about being responsive.

MR. RINEHART: All right.

THE COURT: My question is: While a witness is subject to cross-examination, even though he is a defendant, does his attorney have the right to confer with him before he is cross-examined?

You have been practicing law for a long time.

MR. RINEHART: I fel that I do have the right to confer with him but not to coach him as to what he

may say on cross-examination or how to answer questions.

THE COURT: Then what else would you need to talk to him about?

MR. RINEHART: I don't know. Such as whom should I call as the next witness.

THE COURT: All right.

MR. RINEHART: There are numerous strategic things that an attorney must confer with his client about.

THE COURT: Well I don't have any questions, Mr. Rinehart, about what you—I think you are a disciplined man. I think you are trained in the law. And I think if you should tell me, for instance, that you would not discuss this direct testimony with your client I would accept that statement without any qualification.

MR. RINEHART: Your Honor, I can assure you of that.

THE COURT: I understand that. But your client, as far as I know, has not had any legal training; and I don't know anything about him other than what I have heard here today. And I don't know that he is subject to that same instruction—that he would understand it.

I think he would understand it if I told him just not to talk to you; and I just think it is better that he not talk to you about anything.

I think you might ask him right now—right here while we are here—what witnesses he thinks you ought to call in the morning.

Let's put it this way. You ask him right now if he thinks there are any witnesses you ought to call during the evening. If anything comes up after he has been cross-examined, and after you have had an opportunity for redirect, we would have a recess and you would have all the time you need to talk to him about strategies or anything else. We will take the rest of this month, if necessary, to give you an opportunity and him an opportunity for a fair trial. But we are not going to let strategy take the place of this situation.

And I have held that I find that I don't think you would do anything wrong; but I think it would be better,

under the circumstances of this case. And that is my ruling.

MR. RINEHART: If that is your ruling, Your Honor, we will obey it.

THE COURT: All right. Now you just move to the side, please.

Now, Mr. Geders, will you stand up. I direct you not to discuss your testimony in this case with anyone until you are back here tomorrow morning at 9:30 for the purpose of being cross-examined.

Do you understand that?

MR. GEDERS: I understand.

THE COURT: All right, thank you. All right, the Court will be in recess.

Trial Transcript Page 1163 (lines 24-25), Page 1164 (all), Page 1165 (lines 1-3)

(Exchange on morning following 16-hour overnight recess of Court at which time the trial proceeding resumed.)

MR. RINEHART: I do, Your Honor. I would like to call John Geders back to the stand for further direct testimony.

As I understand, cross-examination has not commenced yet.

THE COURT: All right. I heard what you say.

What says the Government?

MR. BLASINGAME: We object, Your Honor. I think he had adequate time yesterday to direct-examine him. He does have a right to Redirect.

We think it is outside of the procedure that should be followed.

THE COURT: You have not talked with him, of course, have you?

MR. RINEHART: No, I haven't.

This, of course, is not directly related to what I brought out on direct. This is additional matter that I feel is relevant and should be brought out on direct.

THE COURT: Well, it is obvious to me that this case has already taken too long. It was my fault, al-

though I don't know what I could have done about it otherwise.

But I am certainly not going to prohibit you from putting on such testimony as you want to and you may do it.

Anything else?

MR. BLASINGAME: Nothing further at this time.

Trial Transcript Page 1256 (lines 14-24), Page 1257 (lines 1-20)

(Exchange, after jury had retired, during cross-examination of Defendant Geders by Prosecution.)

THE WITNESS: Your Honor?

THE COURT: No, sir. You can go talk to your—don't you say anything.

THE WITNESS: May I talk with my attorney?

MR. RINEHART: No. The Court has already ruled. There is no reason for you to talk to me in reference to this matter.

THE WITNESS: All I wanted to say—

THE COURT: Now just a moment. You know, there is a saying about what a man—the position a man gets himself in when he represents himself, maybe.

It is not normally proper for you to talk to a client while he is on cross examination.

You successfully raised the issue. It is in the record. If I am wrong, why you have the benefit of it.

The statement is not going to get in the record, and the jury has not heard anything about what has happened here. So if anybody wants to dispute some of the statements about this and that—

MR. RINEHART: It has already been ruled on, so—

THE COURT: It is not going before the jury.

MR. RINEHART: There is no need to talk about it any more.

Trial Transcript Page 1334 (lines 15-24), Page 1335 (all), Page 1336 (all), Page 1337 (lines 1-3)

(Recess of Court at lunch (11:50-1:30 p.m.) following conclusion of Prosecution's cross-examination of Defendant Geders and before re-direct examination of Defendant Geders by defense counsel Rinehart, with admonitory instructions by the Court to the jury.)

MR. LaSPADA: Your Honor, I have no further questions of this witness.

THE COURT: It is ten minutes until twelve. Would you like to proceed now or would you—

MR. RINEHART: I would rather take the recess for lunch, Your Honor.

THE COURT: All right. I think we might.

Ladies and Gentlemen, we will have a recess for lunch and I will ask that you be back in the juryroom by 1:30. Remember all of the instructions I have given you.

Don't talk about this case among yourselves or allow anyone to talk with you about it.

Don't read anything about it or look at anything about it or hear anything about it.

You may now go out through the jury room.

Please be back by 1:30. Thank you.

'Thereupon the following proceedings were had in the absence of the jury:)

THE COURT: You may step down.

MR. BLASINGAME: May he be instructed that he is still not to confer with anyone whatsoever?

MR. RINEHART: Your Honor, I know of no way that I can properly examine my client on redirect unless I talk to him about the cross examination and about other factors pertaining to this case.

THE COURT: Well, if I had not recessed what would you have done?

MR. RINEHART: If you had not recessed—which has not happened of course.

THE COURT: Well, if I had not?

MR. RINEHART: Then I probably would not have discussed it.

THE COURT: Because it is a question now of—you say that you know of no way that you would have been able to do it; so I thought I would ask you what you would have done.

MR. RINEHART: I would have probably gone ahead without talking to him.

THE COURT: Well, isn't that normal procedure?

MR. RINEHART: It is if there is no recess.

THE COURT: Mr. Rinehart, I don't think you are entitled to that right, but I am going to give the defendant that right. He can talk to you.

MR. RINEHART: Thank you.

THE COURT: And you can talk to him. But he is not entitled to it.

MR. RINEHART: All right.

THE COURT: Thank you. The Court will be in recess until 1:30.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 73-3966

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL J. FINK AND JOHN A. GEDERS,
DEFENDANTS-APPELLANTS

Oct. 7, 1974

Defendants were convicted before the United States District Court for the Middle District of Florida, Ben Krentzman, J., of conspiracy to import marijuana, illegal importation of marijuana and possession of marijuana and they appealed. The Court of Appeals, Moore, Circuit Judge, held that testimony of federal narcotics agent that one defendant had reputation in community as drug smuggler and distributor was admissible to rebut entrapment defense; that refusal to order prosecution witnesses to submit themselves to defense deposition or to order them to discuss case with counsel for defense was within trial court's discretion; and that directing defendant not to discuss his testimony with anyone until after recess did not constitute reversible error absent showing of harm.

Affirmed.

1. Criminal Law Section 37(1)

Purpose of entrapment defense is to inhibit the use by the Government of pressure tactics which cause the commission of an offense by one who is not ordinarily disposed to commit it.

2. Criminal Law Section 37(1)

Entrapment defense is not readily available to one who has evidenced an inclination to commit the type of offense with which he is charged.

3. Criminal Law Section 376

Once defendant indicates his reliance on entrapment defense, Government is permitted to tender evidence on defendant's predisposition to commit the type of crime charged.

4. Criminal Law Section 376

"Reputation" or "character" evidence is admissible to rebut an entrapment defense.

5. Criminal Law Section 376

In prosecution for conspiracy to import marijuana and importation and possession of marijuana, testimony of narcotics agent that one defendant has reputation in community as drug smuggler and distributor was admissible to rebut entrapment defense. 18 U.S.C.A. § 371; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 1002(a), 21 U.S.C.A. §§ 841(a)(1), 952(a).

6. Witnesses Section 274(1)

Refusal to permit defense to question prosecution witness, who had testified in rebuttal of defendant's entrapment defense that defendant had reputation in community as drug smuggler and distributor, concerning specific events or activities of defendant that gave rise to his adverse public image was within trial court's discretion.

7. Criminal Law Section 379

Character reputation is established not by what one knows to be fact concerning another but what one has heard in the community about the person in question.

8. Criminal Law Section 380

Evidence of specific acts or conduct is not admissible to prove or disprove the reputation that a defendant holds in his community.

9. Criminal Law Section 376

Predisposition to commit crime of type of which the defendant stands accused may be demonstrated for purpose of rebutting entrapment defense by evidence that defendant has reputation of one who has committed a particular type of illegal action in his community.

10. Criminal Law Section 589(1)

Refusal to grant defendant continuance after prosecution witness has testified in rebuttal of entrapment defense concerning defendant's reputation in community as drug smuggler and distributor was within trial court's discretion.

11. Criminal Law Section 569

Evidence, inter alia, that defendants had taken part in transferring cargo of marijuana from plane to waiting vehicle sustained determination that defendants were not entrapped through pilot who had informed authorities of plan for importing marijuana and that defendants had not renounced their enterprise of smuggling marijuana, despite contention that defendants had attempted to persuade pilot to slow down during flight to permit cargo to be pettisoned. 18 U.S.C.A. § 371; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 1002(a), 21 U.S.C.A. §§ 841(a)(1), 952(a).

12. Criminal Law Section 627.5(2)

Except for capital cases, question of extent of defense discovery, at least that discovery which requires judicial assistance, is matter within discretion of trial court. 18 U.S.C.A. § 3432.

13. Criminal Law Section 627.5(2)

In exercising its discretion with respect to determining extent of defense discovery, trial court must weigh variety of factors and must balance need of accused for depositions requested against possibility that prospective witnesses might be harassed or intimidated as result of their submission to the discovery process.

14. Criminal Law Section 627.5(2)

Refusal to order prosecution witnesses to submit themselves to defense deposition or to order them to discuss case with counsel for defense was within trial court's discretion in view of clear evidence that defendants were capable of harassment.

15. Criminal Law Section 666½

Trial court did not improperly refuse to interfere with alleged policy of United States Customs Service prohibiting its agents from discussing facts of pending cases with defense counsel without permission of United States attorney where, when defense counsel reported to trial court that federal agents had refused to speak with defense without permission of United States attorney, trial court stated that defense counsel had the right to talk to any witnesses who wanted to talk with defense counsel and ordered United States attorney to "just stay away."

16. Criminal Law Section 1166.11

Depriving defendant of assistance of counsel during 16-hour recess by directing him not to discuss his testimony with anyone during the recess did not constitute reversible error absent showing of harm to defendant.

Appeals from the United States District Court
for the Middle District of Florida

Before MOORE,* AINSWORTH and RONEY, Circuit Judges.

MOORE, Circuit Judge:

This is an appeal by John Geders and Michael Fink from a judgment of conviction by the United States Dis-

* Hon. Leonard P. Moore, Senior Circuit Judge for the Second Circuit, sitting by designation.

trict Court for the Middle District of Florida, the Hon. Ben Krentzman, *Judge*, entered pursuant to a jury verdict. Appellants were convicted on all three counts of an indictment charging them with: (a) conspiracy to import approximately one thousand pounds of marijuana into the United States in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 371; (b) illegal importation of said marijuana into the United States; and (c) possession of marijuana in violation of 21 U.S.C. § 841(a)(1).

The government alleged that appellants Geders and Fink conspired with seven others, Rufus Randolph Surles, Jr., James M. Mahoney, Randy Kilgore, Fred Fink, Steven Patrick, Tom Waddington (now deceased) and David Butler, to smuggle marijuana into this country by air from Colombia, South America, via Inagua, The Bahama Islands. According to the prosecution, the plot germinated in September 1972 when John Geders, Randy Kilgore and Michael Fink concluded that together they possessed the wherewithal to smuggle a large quantity of marijuana into this country. Geders agreed to provide a South American "contact" or drug supply while Fink promised to find financial backing for the venture. Randy Kilgore assured the others that he would make arrangements with a knowledgeable and trustworthy pilot who would be able and willing to fly the cargo of drugs into the United States undetected.

Michael Fink made good on his promise. He introduced James M. Mahoney and Tom Waddington to the scheme, and they agreed to supply the necessary capital. After a few false starts, Randy Kilgore found David Butler, a pilot with access to a Piper Aztec aircraft, who was willing to make the trip to Colombia for a $10,000 fee plus expenses and fifty pounds of marijuana. Additional conspirators also emerged. Rufus Randolph Surles, Jr., agreed to provide a trailer, of the type normally used by vacationers on camping trips, to which the marijuana could be transferred once it was landed. Steven Patrick agreed to drive the camping trailer.

In David Butler the other conspirators found not only an able pilot but also a man who seemed well versed in the lore of the smuggling business. On several occasions

Butler alluded to his prior experience in the field. He advised his employers to land the marijuana-laden plane at Lehigh Acres, an abandoned housing development near Tampa, Florida, and made other helpful suggestions with respect to the details of the illegal importation. He suggested reentry into the United States via the Bahama Islands where he claimed to have the customs officials bribed; he suggested that the other conspirators, when meeting the plane at the time and place of unloading, should be equipped with walkie-talkies for communication with the plane and should carry roofing nails to strew in the path of would-be pursuers.

Early Sunday morning, November 26, 1972, David Butler, John Geders and Jim Mahoney boarded Butler's rented plane and took off for Colombia, South America. On the return trip, after stopping at Inagua, the plane landed at the pre-arranged location near Tampa. The marijuana was transferred from the plane to the camper which left the landing site escorted by Randy Kilgore and Michael Fink. The caravan did not get far, however, because federal agents soon closed in. Steven Patrick, the driver of the camping trailer filled with marijuana, was immediately apprehended. Kilgore and Fink eluded immediate capture but were eventually arrested.

It seems that this well orchestrated scheme never really had a chance for success. The authorities had been informed of the group's plans far in advance by the pilot, David Butler. For his help in thwarting the smuggling attempt, the United States Customs Service agreed to permit Butler to retain the fee paid to him by the other conspirators.

The trial of the conspirators began on October 9, 1973.[1] Prior thereto Randy Kilgore and Steven Patrick pleaded guilty to a single conspiracy count and agreed to testify for the prosecution. Although David Butler was indicted along with the others, the government moved to dismiss the charges against him and the court granted the motion.

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[1] Defendant James M. Mahoney was granted a severance and his case was tried separately.

As their primary defense at trial, appellants Geders and Fink argued that they had been entrapped by Butler, the government informer. Not only did he assist them in the furtherance of the importation scheme but, according to appellants, Butler induced them to commit the crime and had been paid to do so by the government who hired Butler as a sort of modern day bounty hunter. As a matter of fact, appellant Geders who was traveling in the plane with Butler on the trip from South America, claims that when the plane landed in Inagua before its reentry into the United States he was informed by a native that Butler appeared to be working with the police. After the plane was again in the air, Geders tried to persuade Butler to slow the plane down so that he and Mahoney could dump the marijuana into the sea. Butler ridiculed Geders' apprehensions and refused to permit anyone to unload the contraband until designated rendezvous was made.

The government, on the other hand, insisted that Butler had, at all times, merely assisted a plot which had begun before he entered the picture, and that anything he did which appeared to further the conspiracy was done to gain the confidence of the conspirators, a permissible objective in undercover police work.

The entrapment defense was presented to the jury which, nevertheless, returned a guilty verdict.

On this appeal appellants urge that fourteen separate errors were made in the court below with singly or together compel reversal of the convictions rendered by the jury. Many of the claims raised by the appellants are frivolous and warrant no discussion in this court. Efficiency demands that many of the remaining questions be treated in combination.

I.

Appellants have broadly attacked the district court's handling of the entrapment issue. They argue: that the government should have been prohibited from introducing unflattering evidence with respect to defendant Geders' reputation; that the defense was unfairly barred from

either ascertaining the events up which this reputation was based or introducing rebuttal character testimony after the prosecution had attacked defendant Geders' reputation; and that the government's participation in the smuggling enterprise through its avowed agent, David Butler, was so pervasive and so critical to the consummation of the crime that any prosecution of the appellants is unconscionable.

Throughout the trial appellants placed substantial reliance on an entrapment defense, *i.e.*, on the argument that they were reluctant participants in a criminal scheme engineered by a government agent who, for reasons of financial gain, had employed a "tremendous sales pitch" to overcome appellants' natural antipathy toward the commission of illegal acts.

[1-3] The purpose of the entrapment defense is to inhibit the use of pressure tactics by the government which cause the commission of an offense *by one who is not ordinarily disposed to commit it. See* Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1939). Naturally, the defense is not readily available to one who has evidenced an inclination to commit the type of offense with which he is charged. The government, therefore, once a defendant indicates his reliance on the entrapment defense, is permitted to tender evidence on the defendant's predisposition to commit the type of crime charged.

In this case the prosecution introduced Charles Hudson, a federal Narcotics Agent, who testified that he had talked to confidential informants and had examined intelligence files in the Hillsborough County, Florida, Sheriff's Office and had thereby ascertained that defendant Geders had a reputation in his community as a drug smuggler and distributor. When the defense asked to see the files on which the witness' testimony was based or to be given reference to the specific events contained therein, it was rebuffed by the court which admonished the defense that it would be contrary to the rules of evidence for the prosecution to admit evidence of the

specific acts of defendant Geders which gave rise to his unsavory reputation.

[4] It has long been the rule in this Circuit that "reputation" or "character" evidence can be introduced by the government to rebut an entrapment defense. In fact, it has been specifically held that reputation evidence of the sort introduced in this trial is permissible.

> We have repeatedly held that once the defense of entrapment is raised the government may introduce hearsay testimony concerning the defendant's past reputation as bearing upon the defendant's predisposition to commit the crime and the reasonableness of the conduct by the government agents. Washington v. United States, 5 Cir., 1960, 275 F.2d 687; Rocha v. United States, 5 Cir., 1968, 401 F.2d 529; Thompson v. United States, 5 Cir., 1968, 403 F.2d 209. Moreover, in the case of Thompson v. United States, supra, this court specifically approved the use of reputation evidence in the form of testimony which the witness gleaned from the reports of a local police department.

United States v. Robinson, 446 F.2d 562, 563-564 (5th Cir. 1971).

[5-8] Not only was the trial court correct in admitting Agent Hudson's testimony, it was also well within established principles when it refused to permit the defense to question the witness about the specific events or activities of defendant Geders that gave rise to his adverse public image. Character reputation is established not by what one knows to be fact concerning another, but by what one has heard in the community about the person in question. Michelson v. United States, 335 U.S. 469, 482, 69 S.Ct. 213, 93 L.Ed. 168 (1948). Thus, evidence of specific acts or conduct is not admissible to prove or disprove the reputation that a defendant holds in his community. Stewart v. United States, 70 App. D.C. 101, 104 F.2d 234 (1939).

Defendant Geders also argues that after this evidence with respect to his reputation was introduced by the prosecution, he was forbidden from rebutting it, or at least attenuating its impact, by introducing favorable reputation evidence. In fact, all that actually happened was that the court refused to grant the defendant a continuance, after Agent Hudson testified, so that he might search for character witnesses of his own. Defendant Geders argued that he needed the continuance because Agent Hudson's testimony was of an unexpected and surprising nature.

[9] It is well settled that once a defendant indicates his intention to rely on an intrapment defense, the prosecution can be expected to prove, if it can, that the defendant had a predisposition to commit the type of crime of which he stands accused. In this Circuit predisposition can be demonstrated by evidence that in his community the defendant had the reputation of one who committed a particular type of illegal act. Such evidence can by no stretch of the imagination be considered surprising or unexpected.

[10] In view of the prevailing case law, Agent Hudson's testimony did not introduce a new issue and the decision whether or not to grant a continuance to the defense under the circumstances was well within the discretion of the trial judge. He did not abuse that discretion.

Finally, appellants argue that, all things considered, the government's conduct was so unconscionable that the prosecution ought to be dismissed. In making this argument appellants put great emphasis on the testimony of John Geders who stated that on several occasions subsequent to leaving the Bahamas on their return to this country, he and co-defendant James Mahoney attempted to persuade Butler, the police agent and pilot, to slow down so that they might jettison their illicit cargo. According to Geders, Butler refused. Thus, as the defense tells it, the defendants, through Geders and Mahoney, had renounced their criminal enterprise and were attempting to dissassociate themselves from it.

[11] This is, of course, simply another way of saying that the defendants were entrapped by the government into the commission of the crimes charged. This argument had already been presented to the jury with

great force and we see no reason to interfere with the jury's evaluation of it—something that we could do only if we found that the jury had acted upon insufficient evidence or improper instructions. Neither ground is present here. The jury was undoubtedly persuaded by the uncontested fact that once the plane landed all the defendants present, including Geders, took part in transferring the cargo of marijuana to the waiting camper. This course of action seems completely inconsistent with defendant Geders' tale of renunciation and entrapment.

II.

Appellants' second major contention is that their defense efforts were hamstrung by the trial court's refusal to afford them its assistance in their attempts to obtain adequate pre-trial discovery. On numerous occasions the defendants asked the court to order various prosecution witnesses to submit themselves for deposition or, at the very least, to order these witnesses to discuss the facts of the case with the defense attorneys. Their pleas were consistently and, according to appellants, unfairly rebuffed. Appellants argue that the court's refusal to compel discovery left them "deaf, dumb and blind, and totally unable to formulate a proper defense . . ." and constituted a denial of fundamental fairness.

Appellants concede that there is no provision in the Federal Rules of Criminal Procedure, nor anywhere else, that specifically directs the trial court to order prosecution witnesses to give depositions to the defense or to submit themselves to pre-trial oral interrogation at the hands of defense counsel. Nevertheless, appellants argue that such action by the trial court, which is not inconsistent with those rules, is vital to the maintenance of procedural fairness as that principle is embodied in the Federal Constitution.

The constitutional status of the right of a criminal defendant to depose witnesses was settled, at least in this Circuit, in United States v. Hancock, 411 F.2d 1285, 1286-1287 (5th Cir.), cert. denied, 404 U.S. 833, 92 S.Ct. 81, 30 L.Ed.2d 63 (1971), where Chief Judge Brown wrote:

> Initially Hancock [the defendant] alleges error of constitutional dimensions by asserting that the Trial Court's denial of his motions for a list of government witnesses and a discovery order *for the purpose of taking their depositions* violated his rights under the Fifth and Sixth Amendments. . . . [W]ith the scope of discovery in criminal prosecutions narrower than it is in civil cases, Campbell v. Eastland, 5 Cir., 1962, 307 F.2d 478, 487, cert. denied, 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed.2d 502, and in the absence of a rule which permits the taking of depositions of witnesses who will appear at the trial of a criminal case, we cannot say at this juncture that such a procedure has yet been elevated to a constitutional plane even though some states have seen fit to adopt it.

(Emphasis supplied).

Moreover, appellants' arguments notwithstanding, at least one Circuit Court of Appeals has held that Rule 16(b) of the Federal Rules of Criminal Procedure forbids a trial court from ordering those who will serve as witnesses for the prosecution to submit to defense deposition. *See* United States v. Conder, 423 F.2d 904, 910 (6th Cir. 1970).

[12] The general view, however, is that, with the exception of capital cases,[2] the question of the extent of defense discovery, at least that discovery which requires judicial assistance, is a matter within the discretion of the trial court. United States v. Richter, 488 F.2d 170, 175 (9th Cir. 1973). That discretion is not easily abused. "Denial of a motion to take a deposition is . . . reviewable on appeal from a judgment of conviction but defendant has a heavy burden to show an abuse of dis-

[2] 18 U.S.C. § 3432 requires that in capital cases the defendant be furnished a list of the names and addresses of the witnesses to be called by the government. The special status of pre-trial discovery in capital cases is discussed in Gregory v. United States, 125 U.S. App.D.C. 140, 369 F.2d 185 (1966).

cretion by the trial court, and no defendant thus far has prevailed on such an appeal." C. Wright, I Federal Practice and Procedure § 242, at 482 (1969).

[13] In exercising its discretion the trial court must weigh a variety of factors. For instance, it must balance the need of the accused for the depositions requested against the possibility that prospective witnesses might be harassed or intimidated as a result of their submission to the discovery process. United States v. Cole, 449 F.2d 194, 198 (8th Cir. 1971), cert. denied, 405 U.S. 931, 92 S.Ct. 987, 30 L.Ed.2d 806 (1972).

[14] In this case there was clear evidence that the defendants were capable of harassment. One of the conspirators, who at trial testified as a witness for the prosecution, stated that appellant Geders carried a gun during the smuggling operation which he intended to use against David Butler if he sensed that Butler intended a double-cross. Furthermore, decision to testify for the prosecution might mark him or the members of his family for some act of revenge by the other conspirators. Under the circumstances we cannot say that the trial judge abused his discretion when he refused to order prosecution witnesses to submit themselves to defense deposition or to order them to discuss the case with counsel for the defense.

Finally, appellants claim that reversible error resulted from the court's refusal to interfere with the policy of the United States Customs Service which prohibits its agents from discussing the facts of pending cases with defense counsel without the permission of the United States Attorney.

[15] Appellants' argument is well taken to the extent that tradition forbids the prosecution from ordering its witnesses to refuse to answer pre-trial inquiries made by the defense. Canon 39 of the old Canons of Professional Ethics of the American Bar Association and Canon 10 of the Code of Trial Lawyers state that: "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party." However,

there is no evidence that the trial court failed to apply the law in this case. When defense counsel reported to the court that Federal Agents Buchanan and Christenberry refused to speak with the defense without the permission of the United States Attorney, Mr. Blasingame, the following colloquy ensued:

> Mr. Rhinehart: Right. I feel that at this time we should be able to talk to these witnesses, and that they should be instructed that they should talk to us.
>
> The Court: . . . You have got a right to talk to any witness who wants to talk to you. . . . You can talk to any of them. I will say this you can talk to anybody, period.
>
> When I say "period", I mean there is no limitation. *And, Mr. Blasingame, you just stay away.*

T. 910-912. (Emphasis supplied).

Appellants' contentions with respect to pre-trial discovery have been based, by and large, on some unfair characterizations of federal criminal procedure. Appellants have stated both to this court and to the court below that their inability to depose prosecution witnesses completely eviscerated their defense because they were never adequately informed of the charges against them and because they could not effectively employ the invaluable tool of cross-examination.

Appellants rightly point out that "[t]here is a tremendous difference in the words stating a crime in an indictment or an information, and the actual facts that a Defendant must meet at the trial of the cause." Appellants' Brief, at 8. However, they go too far when they conclude that this observation compels the taking of depositions. Appellants are ignoring the provision, made in Rule 7(f) of the Federal Rules of Criminal Procedure, for the issuance of a Bill of Particulars, a provision which was incorporated especially to close the information gap that may exist between the facts contained in the indictment and the factual issues which mature at trial.

Appellants also argue that pre-trial depositions are imperative if the defense is to utilize effectively its right to cross-examine the prosecution's witnesses. Again appellants ignore the fact that the Jencks Act, 18 U.S.C. § 3500, permits them to obtain from the prosecution all material statements made to it by its witnesses for purposes of defense cross-examination.

III.

[16] At one point during the trial, defendant Geders took the stand to testify in his own behalf. After being examined on direct until 4:55 pm, he was tendered for cross-examination. The prosecution moved for a recess at that time in order that cross-examination might be deferred until the following day. The court granted the motion and, after the jury had been withdrawn, it addressed defendant Geders, saying:

> Now, Mr. Geders, will you stand up. I direct you not to discuss your testimoy in this case with anyone until you are back here tomorrow morning at 9:30 for the purpose of being cross-examined.

Appellants claim that this order deprived defendant Geders of the assistance of counsel for a sixteen hour period at a crucial stage of the trial in violation of his Sixth Amendment rights. Appellants make no claim of actual prejudice accuring from this deprivation; they argue that they do not have to make such a showing and rely on the authority of United States v. Venuto, 182 F.2d 519 (3rd Cir. 1950), which provides:

> To deprive an accused defendant and his counsel of the right to consult with each other during an eighteen hour court recess was most certainly deprivation of the defendant's constitutional right to consult counsel at all stages of the proceeding. We can find no justification for imposing restriction of silence between accused and counsel during a trial recess. We reject the Government contention that defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a federal prosecution. . . . "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculation as to the amount of prejudice arising from its denial."

The United States Court of Appeals for the Second Circuit has more recently faced an identical fact situation, however, and it has required the defendant to make some showing of prejudice before the error of the trial court in forbidding lawyer/client consultation for some limited period rises to the status of reversible error.

> Leighton's [the defendant's] objection to the ruling of the trial court that he could not consult with his attorney during the luncheon recess is framed in terms of the violation of his right to counsel. . . . At no time during, before, or after the recess, did either Leighton or his attorney indicate that they did in fact have something to discuss which might have affected Leighton's testimony or course of action. Leighton's attorney did object to the judge's ruling, but the objection appears to be an attempt to sow reversible error into the record, rather than an effort to indicate to the trial judge that the attorney and client had something to discuss. . . .
>
> Leighton's reliance upon United States v. Venuto, 182 F.2d 519 (3 Cir. 1950), is misplaced. . . . Its [the ruling forbidding attorney/client communication] application to the defendant was quite plainly uncalled for, and we are unable to understand why it was sought or made as to him. We will not, however, reverse the conviction solely on this ground when we can discern no actual harm to the right of effective assistance of counsel, and are convinced that there was none.

United States v. Leighton, 386 F.2d 822 (2d Cir. 1967).

Because, like the Second Circuit, "we can discern no actual harm . . . and are convinced that there was none," we must reject appellants' contention that defendant Ged-

ers' deprivation of the assistance of counsel constitutes reversible error.

We find all other assignments of error raised by appellants to be without merit. The judgment of the district court is therefore affirmed.

SUPRFME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-5968

JOHN A. GEDERS, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted; limited to Question 1, presented by the petition which reads as follows:

> "1. Did the Court's order prohibiting defendant Geders and his attorney from conferring with each other during a sixteen hour period at a crucial stage of the trial deprive defendant Geders of his Sixth Amendment right to assistance of counsel?"

April 21, 1975

Mr. Justice Douglas took no part in the consideration or decision of this petition.

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